

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

16 On August 13, 2007, petitioner, a California prisoner proceeding pro se, filed the
17 above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. By order filed
18 January 8, 2008, the Court granted in part respondent's motion to dismiss the petition as
19 unexhausted, and also granted petitioner's motion to stay the petition while petitioner
20 returned to state court to exhaust state remedies with respect to his previously unexhausted
21 claims.¹ The Court therein directed petitioner, after exhausting his state court remedies, to
22 file an amended petition containing all of his exhausted claims. Additionally, the Court
23 directed the Clerk of the Court to administratively close the case while the stay is in effect.
24 Now pending before the Court is petitioner's amended petition.

BACKGROUND

26 In 1995, in the Superior Court of Alameda County, petitioner was found guilty of

²⁸ ¹The case initially was assigned to the Honorable Martin J. Jenkins. On April 7, 2008, the case was re-assigned to the undersigned.

1 carjacking, assault with a deadly weapon, and being an ex-felon in possession of a firearm.
2 He was sentenced to a term of forty-two years to life in state prison. The California Court of
3 Appeal affirmed the conviction and the California Supreme Court denied review. Thereafter,
4 petitioner filed state habeas petitions that were denied in the Superior Court, the California
5 Court of Appeal, and the California Supreme Court.

6 DISCUSSION

7 A. Standard of Review

8 This Court may entertain a petition for a writ of habeas corpus “in behalf of a person
9 in custody pursuant to the judgment of a State court only on the ground that he is in custody
10 in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a);
11 Rose v. Hodes, 423 U.S. 19, 21 (1975). A district court shall “award the writ or issue an
12 order directing the respondent to show cause why the writ should not be granted, unless it
13 appears from the application that the applicant or person detained is not entitled thereto.”
14 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the
15 petition are vague or conclusory, palpably incredible, or patently frivolous or false. See
16 Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (quoting Blackledge v. Allison,
17 431 U.S. 63, 75-76 (1977)).

18 B. Petitioner’s Claims

19 In the amended petition, petitioner asserts the following claims for relief: (1) he was
20 denied due process at his re-sentencing hearing because the judge relied on erroneous factual
21 information to sentence him; (2) he was denied due process at his re-sentencing hearing
22 because he was denied his right to allocution; (3) he was provided ineffective assistance of
23 counsel at trial and at the re-sentencing hearing; (4) the trial court failed to properly instruct
24 the jury with respect to several jury instructions; (5) petitioner was denied a fair trial in
25 violation of due process as a result of perjured testimony by two prosecution witnesses; and
26 (6) his Sixth Amendment rights were violated when he was sentenced to an upper term based
27 on facts found by the trial court, not the jury. Liberally construed, petitioner’s claims are
28 cognizable.

CONCLUSION

For the reasons stated above, the Court orders as follows:

- 1 3. The stay entered herein on January 8, 2008 is hereby LIFTED and the Clerk is
2 directed to ADMINISTRATIVELY REOPEN the instant action.
- 5 2. The Clerk shall serve by certified mail a copy of this order, the amended petition
6 and all attachments thereto (Docket No. 8), on respondent and respondent's counsel, the
7 Attorney General for the State of California. The Clerk shall also serve a copy of this order
8 on petitioner.
- 9 3. Respondent shall file with the Court and serve on petitioner, within **ninety (90)**
10 days of the date this order is filed, an answer conforming in all respects to Rule 5 of the
11 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not
12 be granted based on petitioner's cognizable claims. Respondent shall file with the answer
13 and serve on petitioner a copy of all portions of the state trial record that have been
14 transcribed previously and that are relevant to a determination of the issues presented by the
15 petition. Together with the answer, respondent shall also file a response to petitioner's
16 motion for an evidentiary hearing.
- 17 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with
18 the Court and serving it on respondent's counsel within **thirty (30)** days of the date the
19 answer is filed. Together with the traverse, petitioner may file a reply to respondent's
20 response to the motion for an evidentiary hearing.
- 21 4. In lieu of an answer, respondent may file, within **ninety (90)** days of the date this
22 order is filed, a motion to dismiss on procedural grounds, as set forth in the Advisory
23 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files
24 such a motion, petitioner shall file with the Court and serve on respondent an opposition or
25 statement of non-opposition within **thirty (30)** days of the date the motion is filed, and
26 respondent shall file with the Court and serve on petitioner a reply within **fifteen (15)** days of
27 the date any opposition is filed.
- 28 5. Petitioner is reminded that all communications with the Court must be served on

1 respondent by mailing a true copy of the document to respondent's counsel.

2 6. It is petitioner's responsibility to prosecute this case. Petitioner must keep the
3 Court and respondent informed of any change of address and must comply with the Court's
4 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
5 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

6 7. Upon a showing of good cause, requests for a reasonable extension of time will be
7 granted provided they are filed on or before the deadline they seek to extend.

8 IT IS SO ORDERED.

9 DATED: July 8, 2009


MAXINE M. CHESNEY
United States District Judge